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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERT LEE HIGGINS III, Defendant and Appellant.	2d Crim. No. B263727 (Super. Ct. No. 2013009049) (Ventura County)

A jury convicted Robert Lee Higgins III of two counts of unlawful acts with a child 10 years old or under (counts 1 & 3; Pen. Code, § 288.7, subd. (a))[1] and two counts of committing a lewd act on a child (counts 2 & 4; § 288, subd. (a)).

The trial court sentenced Higgins to two consecutive terms of 25 years to life on counts 1 and 3 and two three-year terms on counts 2 and 4 to run concurrently with the terms

[1] All statutory references are to the Penal Code unless otherwise stated.

imposed on counts 1 and 2, for a total term of 50 years to life. We correct the abstract of judgment to show the term on count 2 to be concurrent and not consecutive, and we replace the word "sodomy" with "unlawful intercourse." In all other respects, we affirm.

FACTS

T. was born in April 2003. In February 2008, T. and her mother and father moved into a three-bedroom apartment on Mariposa Street. In 2010, T.'s uncle, Higgins, moved in with them. T.'s mother and father divorced in 2010, and her father moved out in November of that year.

T.'s mother worked the night-shift as a hotel desk clerk from 11:00 p.m. to 7:00 a.m., leaving T. alone in the apartment with Higgins. T.'s mother relied on Higgins to take care of T. while she was at work.

Initially T. was happy to stay home with Higgins while her mother was at work. After a while, however, T. cried "hysterically" when her mother prepared to go to work. T. would "literally have a fit" unless her mother took her to work with her. T. had enjoyed taking showers, but now she refused to take them. She told her mother, "My butt hurts, my butt hurts again." T.'s mother did not suspect Higgins. She thought T. had not been cleaning herself very well. T.'s mother found specks of blood on T.'s underwear. She thought T. got a rash from not cleaning herself and scratched it.

T.'s Testimony

(Counts 1 and 3)

T. testified that while her family lived in the apartment on Mariposa, Higgins penetrated her vagina with his penis on at least three occasions. It hurt. Higgins also tried to make T. put her mouth on his penis.

(Counts 2 and 4)

On three occasions, Higgins invited T. to a house where he stayed occasionally. On one occasion, Higgins took T. into his bedroom and touched her vagina with his hand. Then he pulled down her shorts and underwear and penetrated her vagina with his penis while she was lying on her stomach. Then he turned her over, placed her on top of him and penetrated her vagina with his penis again. That was the last time he raped her.

T. Reports the Abuse

On February 2, 2013, T.'s mother heard T. crying hysterically. T. told her mother she had something to tell her and asked her not to get mad. T. told her mother that Higgins put his hand up her shirt and down her pants. T. also said Higgins would take her into the bedroom, undress her and place her on top of him. She tried to push him away, but he forced her down. T.'s stepfather came into the room and T. told him what happened. T.'s stepfather called her father. T., her stepfather, father and mother all went to the police station.

On the way to the police station, T.'s father called Higgins. At first Higgins denied he molested T., then he tried to blame what happened on T.

T.'s Interview With Police

Detective Juanita Suarez interviewed T. The interview was recorded. T. told Suarez that the first time Higgins molested her she lived with her family in an apartment on Mariposa. She was watching television when Higgins called her into his room. Higgins closed the door, put his hand underneath her clothing and rubbed her vagina. Then she left the room. She did not tell her parents because she did not want to make them mad.

In November 2012, T. and Higgins were at a house where Higgins sometimes stayed. T. was lying on the bed watching television when Higgins got into the bed. Higgins pulled T. towards him. T. tried to push him away, but Higgins pulled her back towards him. He touched her breasts, buttocks and vagina. He penetrated her vagina with his penis and ejaculated inside her.

Another time T. was watching a baseball game on television with her father. Higgins called to T., but she ignored him. T.'s father told her to see what Higgins wanted. She went to his room and he closed the door. He showed her a video on his cell phone. When the video was over, he pulled down his pants and her pants. He grabbed her with two hands and put her on

top of him. She did not tell her parents what happened. She told her father Higgins wanted to show her a video.

After the first two times, Higgins picked up T. at school and they went to a friend's house. They were watching a movie. Higgins's friend was not paying attention to them, he was paying attention to the movie. Higgins was sitting on a swivel chair. He grabbed T. and touched her vagina. T. moved to the couch. When she got up from the couch, Higgins grabbed her again and touched her vagina over her clothes.

On three other occasions when Higgins picked up T. from school, he would grab her, place her on top of him and put his penis inside her vagina. She would try to get away, but he would hold her because he was much stronger.

Physical Examination

Forensic nurse Deanna McCormick conducted a physical examination of T. T.'s hymen showed abnormalities consistent with penetration. That T. tolerated McCormick's use of a catheter was consistent with a child who has suffered some type of long term penetration. The catheter usually caused girls significant pain. The injuries to T.'s vagina were consistent with penetration by a firm, blunt object, like a finger or penis. The injuries were inconsistent with masturbation.

Child Sexual Abuse Accommodation Syndrome

Jody Ward, Ph.D., a forensic psychologist, testified as an expert on Child Sexual Abuse Accommodation Syndrome

(CSAAS). CSAAS is not a tool for determining whether sexual abuse has occurred. Instead, it helps explain the behavior of children who have been sexually abused. Many of the behaviors are contrary to what people commonly expect for adults. Ward said she had not been given the underlying facts of the case. She was not there to testify whether Higgins was guilty or whether T. was telling the truth.

The CSAAS model includes five parts:

The first part is secrecy. A child commonly keeps the abuse secret for a long time. A child sees the situation as threatening even if no threatening words are used. A child feels shame, blames herself for the abuse and is afraid she would be in trouble if she disclosed the abuse.

The second part is helplessness. Children feel helpless because adults are bigger, children are told to obey adults and are dependent on adults for everything. A child cannot protect herself by moving to another home.

The third part is entrapment and accommodation. When the victim does not report the abuse, the abuser uses the secrecy and the child's feeling of helplessness to perpetuate the abuse. The entrapment causes the child to accommodate the abuse and the abuser. Children sometimes put up with abuse because they want to retain the positive aspect of a relationship with the abuser. They may also fear the negative consequences of disclosing the abuse.

The fourth part is delayed and unconvincing disclosure. About two-thirds of children do not report abuse until they are adults. Children may be hesitant at first, but disclose more abuse over time. Children may give cues by complaining about spending time with the abuser. If the person hearing the cues does not pick up on them, the child is less likely to report abuse.

The fifth part is recantation or retraction. Speaking to the police may be stressful. Undergoing an intrusive physical examination may cause a child to recant. Being placed in foster care may cause a child to recant in order to return home. Abused children have trouble recalling the details of the abuse especially where the abuse occurs over a long period of time.

Higgins did not testify or present evidence on his own behalf.

DISCUSSION

I

Higgins contends the trial court erred in allowing CSAAS testimony to exceed its permissible scope.

CSAAS testimony is inadmissible to prove that a molestation occurred. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.) But CSAAS testimony is admissible for the limited purpose of disabusing a jury of misconceptions it might have about how a child reacts to a molestation. (*Ibid.*) The prosecution is not required to expressly state on the record the

evidence that may be viewed as inconsistent with a molestation. (*Ibid*.) It is sufficient if the victim's credibility is placed in issue due to the paradoxical behavior, including a delay in reporting the molestation. (*Id*. at pp. 1744-1745.) Admission of CSAAS testimony is not error because it is introduced as part of the People's case-in-chief, rather than in rebuttal. (*Id*. at p. 1745.)

Higgins relies on *People v. Bowker* (1988) 203 Cal.App.3d 385. In *Bowker* the court took up the question how to apply CSAAS testimony so as to provide the jury with information on a victim's reaction to child abuse without the danger the information will be misapplied as a predictive index by the jury. The court decided that "at a minimum the evidence must be targeted to a specific 'myth' or 'misconception' suggested by the evidence." (*Id*. at pp. 393-394.) *Bowker* gives the example that where a child delays a significant period of time before reporting an incident or pattern of abuse, an expert could testify that such a delay is consistent with the secretive environment created by an abuser. (*Id*. at p. 394.)

It is difficult to see, however, how tailoring CSAAS testimony to the specific evidence presented in the case makes it less likely that the jury would misconstrue CSAAS testimony as evidence of guilt. The best way to prevent the jury from misusing CSAAS testimony is to instruct the jury on its proper use. That is what the trial court did here.

The trial court instructed the jury: "You heard testimony from Dr. Jody Ward regarding child sexual abuse accommodation syndrome. Dr. Jody Ward's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes charged against him. You may consider this evidence only in deciding whether or not [T.'s] conduct was inconsistent with the conduct of someone who has been molested and in evaluating the believability of her testimony."

In any event, if the trial court erred, the error is harmless. Not only did the court properly instruct on the use of CSAAS testimony, Ward herself testified that CSAAS is not a tool for determining whether sexual abuse has occurred; that she had not been given the underlying facts of the case; and that she was not there to testify whether Higgins was guilty or whether T. was telling the truth.

Moreover, the evidence of guilt was overwhelming. It is true T.'s testimony was somewhat inconsistent. But that is to be expected of a young girl who is testifying about traumatic and embarrassing events. T.'s testimony was corroborated by her mother's testimony that T. did not want to be left with Higgins when her mother went to work; that T. complained of a sore buttocks; and that T.'s mother found blood in T.'s underwear. T.'s testimony was further corroborated by the results of a physical examination in which T. tolerated the insertion of a catheter into

her vagina and her vagina showed signs of blunt force trauma. Finally, in a telephone conversation with T.'s father, Higgins blamed the molestation on T.

II

Higgins contends the prosecutor committed misconduct in closing argument.

We note the issue has been forfeited for lack of an objection. (*People v. Hill* (1998) 17 Cal.4th 800, 824.) Had the objection been raised, the result would not change.

After discussing reasonable doubt, the prosecutor stated, "I want to submit to you, too, that if you have a doubt, and you can't convince the other jurors that it's a reasonable doubt, then that's a strong indication that it's not reasonable doubt, and I urge you to discuss it further with the other jurors. So when looking at a doubt, do you have a doubt? Is it based on the evidence from the trial or something else? Can you explain it? Can you articulate it to the other jurors? And does it relate to a material issue? Those are all important factors when determining whether there is a reasonable doubt. And then you can look at the other evidence and see if that resolves it."

Higgins argues that the argument misled the jury on two critical issues: (1) It encouraged holdout jurors to capitulate to the majority, undermining the right to a verdict reached by the independent judgment of each juror; and (2) it misled the jurors

to believe that a reasonable doubt requires an ability to articulate the reasons for a doubt.

A prosecutor commits misconduct under state law only when it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*People v. Hill*, supra, 17 Cal.4th at p. 819.) A prosecutor's behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*Ibid.*)

Here the prosecutor's comments did not constitute a pattern of conduct so egregious as to implicate the federal Constitution. The only question is whether the prosecutor's comments were misconduct under state law.

It is improper for a prosecutor to misstate the law concerning the burden of proof. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 829-830.) But to prevail on such a claim, the defendant must show a reasonable likelihood the jury understood or applied the comments in an improper or erroneous manner. (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) We do not lightly infer that the jury drew the most damaging meaning from the prosecutor's statements. (*Ibid.*)

The People argue the prosecutor's comments were in line with the instructions approved by the United States Supreme Court in *Allen v. United States* (1896) 164 U.S. 492, 501, the so-called "*Allen* charge." There the jurors were instructed in part:

"[I]f much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression on the minds of so many men, equally honest, equally intelligent with himself." (*Ibid*.)

The prosecutor's argument was based on instructions approved by the United States Supreme Court in *Allen v. United States* (1896) 164 U.S. 492. Our Supreme Court disapproved of the *Allen* charge in *People v. Gainer* (1977) 19 Cal.3d 835. The *Gainer* case points out that the *Allen* charge adds an extraneous factor into jury deliberations, that is, the position of the majority of the jurors. That factor is irrelevant to the issue of guilt. (*Id*. at p. 848.) The court also reasoned the instruction is incompatible with the defendant's right to "independently achieve[] juror unanimity." (*Id*. at p. 849.) More recently, in *People v. Valdez* (2012) 55 Cal.4th 82, our Supreme Court approved a "balanced instruction" asking both the majority and dissenting jurors to reconsider their positions. (*Id*. at pp. 163-164.) But the prosecutor's argument here contained no such balance.

The prosecutor suggested ways in which a juror could view the evidence. This included the juror articulating why he or she has a reasonable doubt. Some jurors may be able to do this with relative ease, others may have difficulty doing so. "It is not always easy for a juror to articulate the exact basis for a disagreement after a complicated trial, nor is it necessary that a juror do so." (*People v. Engelman* (2002) 28 Cal.4th 436, 446.)

The prosecutor did not tell the jury that reasonable doubt requires the jury to articulate the reasons for the doubt. The prosecutor suggested that if a juror cannot articulate reasons for the doubt, the juror should consider whether the doubt is reasonable.

At any rate, there is no reasonable likelihood the jury understood or applied the prosecutor's comment in an improper manner. (*People v. Cortez* (2016) 63 Cal.4th 101.) The trial court properly instructed the jury on reasonable doubt. The court also instructed that if the jury believes the attorney's comments conflict with its instructions, the jury must follow the court's instructions. We presume the jury followed the instructions. (*People v. Bonin* (1988) 46 Cal.3d 659, 699.) In addition, as we have stated, the evidence of guilt was overwhelming.

III

Higgins contends his 50-years-to-life sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

Higgins argues that given his age, 38, a 50-years-to-life sentence constitutes a de facto sentence of life without the possibility of parole. He cites *Coker v. Georgia* (1977) 433 U.S. 584, 592, for the proposition that "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than

the purposeless and needless imposition of pain and suffering . . . ."

"Acceptable goals of punishment" include: to vindicate society's sense of justice, to prevent the defendant from harming others and to serve as a warning to those who would commit similar offenses.

Higgins repeatedly raped a girl who was under 10 years old. He engaged in one of society's most heinous crimes, the sexual exploitation of a young child. The need to vindicate society's sense of justice, to protect T. and other potential victims from Higgins, and to serve as a warning, all support a de facto life without possibility of parole. Higgins's sentence does not constitute cruel and unusual punishment.

IV

Higgins contends the abstract of judgment must be corrected because it does not reflect the sentence imposed by the trial court.

The People concede that the abstract is incorrect in that it shows the sentence on count 2 to be consecutive. The abstract should be corrected to show the sentence is concurrent with the sentence on count 4.

Higgins also contends the abstract is incorrect with respect to counts 1 and 3. The abstract correctly shows both counts as violations of section 288.7, subdivision (a). The abstract describes the crimes as "Unlawful Act with Child Under

10 – Sodomy." Higgins complains that the abstract should show "unlawful intercourse" instead of "sodomy". The People concede as much, but state it makes no difference because the abstract correctly shows Higgins was convicted of violating section 288.7, subdivision (a). Nevertheless, there is no reason why the abstract should not correctly describe the offense.

DISPOSITION

The abstract of judgment is corrected to show the sentence in count 2 as concurrent and to replace "sodomy" with "unlawful intercourse." In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

I concur:

YEGAN, J.

TANGEMAN, J.

Ferdinand D. Inumerable, Judge

Superior Court County of Ventura

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

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